IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 87/2011

IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)

AND IN THE MATTER OF LANCELOT INVESTORS FUND, LIMITED (IN OFFICIAL LIQUIDATION) HEREINAFTER REFERRED TO AS THE "COMPANY"

Appearances:	**Mr. Tom Lowe Q.C. instructed by Mr. Sam Dawson of Solomon Harris on behalf of the Appellant, KBC Investments Limited**
	Mr. Ross McDonough of Campbells on behalf of the Official Liquidator
Before:	**The Hon. Mr. Justice Charles Quin**
Heard:	**13th and 14th May 2013**

JUDGMENT

INTRODUCTION

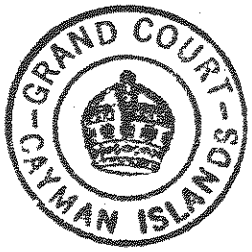
1. On or about the 13th July 2009 Fortis Bank (Cayman) Ltd. ("Fortis") filed a Proof of Claim in the United States bankruptcy proceeding for the debt of US$17,897,266.72, (the "Debt") being the balance of the December 2007 Redemption Request which had not been paid by Lancelot Investors Limited ("the Company").

2. Pursuant to the Cross-border Insolvency Protocol Agreement regarding the Company dated the 19th August 2009, responsibility for the adjudication of proofs of claim in the Company is the responsibility of the Official Liquidator, and any proof filed in the United Sates bankruptcy proceeding is deemed to be filed in the Cayman Liquidation.

3. On the 20th September 2012 the Proof of Debt filed by Fortis was formally rejected by the Official Liquidator.

4. On the 14th December 2012 KBC Investments Limited (the "Appellant") issued a Summons for the following Orders:

i. That the rejection of the Appellant's Proof of Debt by notice dated the 20th September 2012 be set aside.



ii. That the Appellant's claim be admitted to proof in the sum of US$17,987,266.72.

iii. That the Appellant's costs of this appeal be paid out of the assets of the Company as an expense of the liquidation, such costs to be taxed if not agreed with the Official Liquidator.

5. This is the hearing of the Appellant's Summons heard on the 13th and 14th May 2013.

6. Before going on to consider the issues to be decided by this Court I herewith set out the Dramatis Personae as agreed between the parties in the Case Memorandum and a chronology of the relevant facts.

DRAMATIS PERSONAE

	Name	Brief Description	Cayman Counsel
1.	KBC Investments Limited	Investor in the Company seeking appeal of rejection of the claim by Fortis by the Official Liquidator	Solomon Harris
2.	Geoffrey Varga	Official Liquidator of the Company	Campbells
3.	Lancelot Investment Management LLC	Investment Manager to the Company	Not a party
4.	Gregory Bell	Director of Lancelot Investment Management LLC	Not a party
5.	Fortis Bank (Cayman) Limited (n/k/a ABN Amro Fund Services Bank (Cayman) Limited	Provided custodial services to the Appellant	Not a party
6.	ABL Capital Limited	A fund of fund counterparty with the KBC Investments Cayman Islands V, Ltd.	Not a party
7.	KBC Investments Cayman Islands V Limited	Affiliate of the Appellant and counterparty with ABL Capital Limited	
8.	Swiss Financial Services (Bahamas) Limited	Provided administrative services to the Company	

7. On the 2nd September 2002 the Company was incorporated as Granite Investors Fund Limited under the laws of the Cayman Islands as a Cayman Islands exempted company.

8. On the 6th October 2002 the Company commenced operations, with its registered office at the office of Walkers SPV Limited, Walker House, George Town, Grand Cayman. The authorised share capital of the Company is US$50,000.00 consisting of 5 million shares of nominal or par value of US$0.01 per share.

9. The founding directors of the Company appointed on the 27th September 2002 were Messrs. Gregory Bell ("Mr. Bell"), Vincent King and Benjamin Miller.

10. On the 10th February 2003 Granite Investors Fund Limited changed its name to Lancelot Investors Fund Limited. This Company operated as an open ended investment company and is registered with the Cayman Islands Monetary Authority (CIMA) as Mutual Fund under the Mutual Fund Laws (2007 Revision).

11. The Memorandum and Articles of Association of the Company (the "Articles") are dated the 2nd September 2010.

12. It is common ground that the powers of a company to redeem its shares stem from the provisions of the Companies Law. A company may issue shares on terms that they may be redeemed, if authorised by the articles of the company, and if the articles of the company provide that it may issue redeemable shares. The articles also provide a mechanism for such redemptions.

13. Article 6 of the Company's Articles reads as follows:

> *"Subject as otherwise provided in these Articles, all shares for the time being and from time to time unissued shall be under the control of the Directors, and my be re-designated, allotted or disposed of in such manner, to such persons and on such terms as the Directors in their absolute discretion may think fit."*

14. Article 8 reads:

> *"If at any time the share capital is divided into different classes of shares, the rights attaching to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied or abrogated with the consent in writing of the holders of two-thirds of the issued shares of that class, or with the sanction of a resolution passed by at least a two-thirds majority of the holders of shares of the class present in person or by proxy at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these Articles relating to general meetings of the Company shall mutatis mutandis apply, but so that the necessary quorum shall be at least one person holding or representing by proxy at least one-third of the issued shares of the class and that any holder of shares of the class present in person or by proxy may demand a poll."*

15. Article 41 reads:

> *"Subject to the provisions of the Companies Law, the Company may:*
>
> *(a) Issue shares on terms that they are to be redeemed or are liable to be redeemed at the option of the Company or the Member on such terms and in such manner as the Directors may, before the issue of such shares, determine;*
>
> *(b) Purchase its own shares (including any redeemable shares) on such terms and in such manner as the Directors may determine and agree with the Member; and*
>
> (c) *Make a payment in respect of the redemption or purchase of its own shares otherwise than out of profits or the proceeds of a fresh issue of shares."*

GRAND COURT - CAYMAN ISLANDS

16. Article 42 reads:

> *"Any share in respect of which notice of redemption has been given shall not be entitled to participate in the profits of the Company in respect of the period after the date specified as the date of redemption in the notice of redemption."*

17. Article 43 reads:

> *"The redemption or purchase of any share shall not be deemed to give rise to the redemption or purchase of any other share."*

18. Since commencing business the Company has issued three Confidential Information Memoranda (the "CIMs"). The first was issued in or around October 2002 (the "2002 CIM"), the second, in or around December 2003 (the "2003 CIM"), and, the most recent CIM is the "2006 CIM", issued in March 2006.

19. The investment objective differs slightly between each CIM but it is common ground that the difference is not material to this Appeal.

20. Lancelot Investments Management LLC (the "Investment Manager"), a Delaware Limited Company, acted as the investment manager to the Company. The 2006 CIM describes the role of the Investment Manager on page 12 as follows:

> *"The Fund has appointed the Investment Manager to serve as its investment manager pursuant to the Investment Management Agreement between the Fund and the Investment Manager dated October 1, 2002 (the "Investment Manager Agreement") [the "IMA"]. The Investment Manager will be responsible for, and control, all day-to-day operations of the Fund, including its investment activities and decisions, subject only to any restrictions which may from time to time be adopted by the Fund's Board of Directors and to the review and approval by the Loan Acquisition Officer in the case of investment activities and decisions, as discussed herein. The Investment Manager's sole principal is Gregory Bell."*

21. The 2006 CIM states in its Summary under the title Redemptions at page 3:

> *"Following the one-year anniversary of the date a Shareholder purchased Shares, for Shares purchased by a Shareholder on or before January 31, 2006, such Shareholder may redeem such Shares as the Share NAV as of the last business day of a fiscal quarter upon at least sixty (60) calendar days' prior written notice to the Administrator; provided, however, that the Fund typically will allow partial redemptions only if the aggregate Share NAV of the Shares held by the redeeming Shareholder after such redemption equals or exceeds $1,000,000."*

The 2006 CIM went on to state:

> *"Commencing on the two-year anniversary of the date a Shareholder purchased Shares, for Shares purchased by a Shareholder on or after February 1, 2006, such Shareholder may redeem such Shares as the Share NAV as of the last business day of a fiscal quarter upon at least sixty (60) calendar days prior written notice to the Administrator (however, as discussed below, a different NAV is used for such Shares redeemed on the two-year anniversary); provided, however, that the Fund typically will allow partial redemptions only if the aggregate Share NAV of the Shares held by the redeeming Shareholder after such redemption equals or exceeds $1,000,000. It should be noted that if a redemption is made on the two-year anniversary, for Shares purchased on or after February 1, 2006, such redemption will be made at the NAV immediately prior to the opening of business on such two-year anniversary. Redemptions may be permitted at such other times or with such shorter notice as the Fund, in its absolute discretion, may determine."*

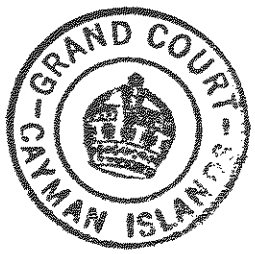
22. Further down on page 3 of the Summary of the 2006 CIM, it reads:

> *"Payment of redemption proceeds will be made as soon as reasonably practicable (generally not more than thirty (30) calendar days) after the redemption date, unless its redemption requires a computation which cannot be completed within such thirty (30) day period. Notwithstanding the foregoing, in the event a Shareholder redeems 90% or more of its Shares as of any redemption date, the Fund generally will make payment of at least 90% of such redemption proceeds as soon as practicable (generally not more than thirty (30) calendar days), with the Fund retaining the right to withhold up to 10% of such redemption proceeds pending completion of the year-end audit of the Fund's financial statements for the year during which the redemption occurs. Any amounts so withheld will be paid to the redeeming Shareholder without interest within fifteen (15) business days after the issuance of the audit report*

(subject to any adjustment required to reflect the audit report). Notwithstanding the foregoing, the Investment Manager may delay redemption payments if such delay is necessary in the opinion of the Investment Manager, to effectuate an orderly liquidation of Fund assets in a manner that is not detrimental to the Fund or its remaining Shareholders. The Fund, at its discretion may make redemption payments at other times or upon shorter notice as the Fund in its absolute discretion may determine. The Shares are valued, and generally all redemption payments are made, in US dollars."

23. On pages 28 and 29 of the 2006 CIM the issue of redemptions is addressed under a subheading of Voluntary Redemptions which reads as follows:

"*Shares may be redeemed as of the last business day of each fiscal quarter at Share NAV calculated as described herein. Notwithstanding the foregoing, for Shares purchased by Shareholders on or before January 31, 2006, Shareholders may not redeem Shares prior to the first fiscal quarter end following the one-year anniversary of their purchase of the Shares being redeemed. Moreover, for Shares purchased by Shareholders on or after February 1, 2006, Shareholders may not redeem Shares prior to the two-year anniversary of their purchase of the Shares being redeemed. Shares may be redeemed as of the last business day of each fiscal quarter at Share NAV calculated as described herein. Written notice of redemption must be given to the Administrator at least sixty (60) calendar days prior to the proposed redemption date, indicating the number of Shares proposed to be redeemed; provided, however, that the Fund typically will allow partial redemptions only if the aggregate Share NAV of the Shares held by the redeeming Shareholder after each redemption equals or exceeds $1,000,000. Unless the Fund otherwise agrees, such partial redemptions shall be made on a first-in first-out ("FIFO") basis, with respect to the redeeming Shareholder's Shares. Shares will be redeemed at the Share NAV (determined as of the close of business on the last business day of the relevant quarter [the "calculation date"]), but will be subject to any accrued fees and expenses and any wire transfer fees or transaction costs. However, it should be noted that if a redemption is made on the two-year anniversary, for Shares purchased on or after February 1, 2006, such redemption will be made at the net asset value immediately prior to the opening of business on such two-year anniversary. Redemptions may be permitted at such other times or with such shorter notice as the Fund, in its absolute discretion, may determine.*"



The 2006 CIM goes on to state at page 29:

> *"Redemptions may be permitted at such other times or with such shorter notice as the Fund, in its absolute discretion may determine. In addition, if the Fund is required to take certain extraordinary actions to accommodate a redemption, such as the liquidation of investments outside of the ordinary course of business, the associated costs may be charged against the Shareholder's redemption proceeds."*

24. The Appellant, is an indirect and wholly owned subsidiary of KBC Bank – a multinational bank headquartered in Belgium.

25. Fortis Bank (Cayman) Ltd.[1] was one of a number of specialized custodial services providers engaged by the Appellant. Fortis acted as the Appellant's custodian for at least six separate Fund of Funds leveraged transactions.

26. Mr. Jatin Tosar ("Mr. Tosar"), the Managing Director of the Appellant swore five affidavits in support of the Appellant's application. At paragraph 28 in his First Affidavit Mr. Tosar avers that:

> *"In order to enable the Appellant's custodians to undertake the role for which they were engaged, those custodians were required to be listed with the relevant hedge fund as the registered shareholder."*

27. The Appellant engaged Fortis to be the registered shareholder of the Company on the 26th August 2005 by entering into a Custodian Agreement ("CA"), which later

[1] Fortis Bank (Cayman) Ltd. later changed its name to ABN AMRO Fund Services Bank (Cayman) Limited ("Fortis")

had one amendment dated the 31st July 2009. Mr. Tosar states that the Appellant held redeemable shares of the Company through its Custodian, Fortis.

28. Mr. Tosar in his Fifth Affidavit confirms that Fortis would be given no more than the barest title necessary to enable it to fulfill its role as the nominal Shareholder. Mr. Tosar avers that the CA confirmed that Fortis could only deal with the assets held at the direction of the Appellant. He refers to several clauses in the CA to demonstrate that the ownership and control of the Shares remained with the Appellant to the maximum extent legally possible. For example, Clause 3.1 of the CA states that:

> *"....Any Cash, Securities or Other Assets shall be held by the Custodian for and on behalf of the Company shall be held by the Custodian in segregated accounts, such that it is plain that the legal owner of such Cash, Securities and Other Assets is the Company and not the Custodian or any third party."*

29. Clause 6 of the CA reads:

> *Ownership*
>
> *"The Company [KBC] and the Custodian [Fortis] acknowledge that the Securities, Other Assets and Cash were held by the Custodian [Fortis] subject to the provisions of this Agreement and the Terms & Conditions (which are incorporated herein brevitatis causa) but that, subject thereto, the beneficial ownership of the Securities, the Other Assets and Cash shall be freely transferable without encumbrance, subject to the terms of such Securities or Other Assets."*

30. Furthermore Mr. Tosar points out that the termination provisions make it clear that upon termination of the CA, Fortis ceases to have any right to custody of the assets it held, and was required to immediately return them to the Appellant. Mr. Tosar refers to Clause 13.6 of the CA which reads:

> *"In the event of the termination of this Agreement, the Custodian shall not be entitled to further compensation or any damages in respect of such termination; and the custodian shall deliver to the Company or to the succeeding Custodian, as directed by the Company, all documents of title to or evidencing ownership of Securities and Other Assets then held by the Custodian on behalf of the Company pursuant to this Agreement duly endorsed or otherwise in requisite form of transfer together with all books of account, records, registers, documents, statements and assets relating to the affairs of the Company."*

31. On the 31st August 2005 Fortis wrote to the Company enclosing a completed dealing form for an investment of US$3,100,000.00 and signed the Company's Subscription Agreement for 3,100,000 Shares - confirming that it was subscribing, as a Custodian of the Appellant and executed the Subscription Agreement as a deed on behalf of the subscriber.

32. On the 1st February 2006, as a result of amendments to the redemption provisions in the 2006 CIM, two classes of shares of the Company were created, the redemption rights, of which depended on when the relevant shares were issued. As Mr. Tosar explains in his First Affidavit:

i. Shares issued prior to the 1st February 2006 which were subject to a one-year lock up from the date of subscription, were hereinafter referred to "PS" Shares.

ii. Shares issued after the 1st February 2006 which were subject to a 2-year lockup from the date of subscription, were hereinafter referred to as "PS-1" Shares.

33. The 2006 CIM was executed in March 2006 and, on the 31st March 2006, the Company issued 7,500.8926 PS-1 Shares to Fortis as Custodian of the Appellant. On the 19th April 2006, Swiss Financial Services (Bahamas) Limited ("SFS") sent Fortis the subscription confirmation.

34. On the 4th April 2006 Fortis, (as Custodian of the Appellant), applied for an additional subscription for PS-1 Shares and submitted US$12 million. Fortis signed an additional Subscription Request which stated that is was to be completed by existing shareholders, instead of a full subscription agreement. This read:

> *"The undersigned [Fortis] hereby subscribes for the additional amount set forth below of Lancelot Investors Fund, Limited's redeeming participating voting shares upon the terms and conditions described in the Memorandum. The undersigned re-states all of the covenants, representations and warranties made in the undersigned's original Subscription Agreement as if they were made on the date hereof and certifies that all of the financial information set forth in the undersigned's original Subscription Agreement remains accurate and complete on the date hereof. The undersigned acknowledges that any additional subscriptions occurring on or after February 1, 2006 will be subject to a two-year lockup as described in the current version of the Fund's Confidential Information Memorandum (the "Memorandum"). The undersigned also acknowledges that, with respect to any additional subscriptions made on or after February 1, 2006, the terms of this Additional Subscription Request supercede the terms of any prior subscription agreement, letter agreement, side letter or other agreement, to the extent those terms relate to the liquidity of, or rights to redeem or withdraw, Fund Shares. The*

undersigned acknowledges receipt of the updated Memorandum dated March 2006."

Fortis also provided updated lists of Authorised "A" and "B" signatories as at the 2nd March 2006 and confirmed that Fortis' signing policy was that any document must be by either two "A" signatories or one "A" signatory and one "B" signaotory.

35. On the 27th April 2006 Fortis, as Custodian of the Appellant, completed an additional Subscription Form for US$4,000,000.00 worth of PS-1 Shares. On the 30th April 2006, 2,476.6673 PS-1 Shares were issued. On the 17th May 2006 SFS sent a Subscription Confirmation to Fortis as Custodian of the Appellant.

36. On the 6th January 2007 a redemption payment of US$10,000,000 was made to Fortis as Custodian of the Appellant.

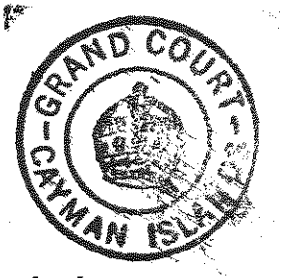
37. On the 4th May 2007 Fortis made an additional Subscription Request to the Company for US$8,000,000 for PS-1 Shares and executed another additional Subscription Request to be completed by existing shareholders instead of a full Subscription Agreement. Fortis provided new updated lists of Authorised "A" and "B" Fortis Signatories as at the 29th January 2007.

SIDE LETTER

38. On the 6th June 2007 the Appellant executed a Side Agreement with ABL Capital Limited ("ABL") ("the Side Letter"). This letter was acknowledged and agreed by Mr. Bell on behalf of the Investment Manager.

39. Mr. Tosar, in his First Affidavit refers to this Side Letter at length. The Side Letter itself refers to the 2006 CIM to all Subscription Agreements, and to the Memorandum and Articles of Association and states that the Company and the Investor agree as follows:

> *"Each and every provision of the Subscription Documents that limits effecting the redemption by an Investor of all or any part of such Investor's Shares in the Fund to the last business day of each fiscal quarter following the two-year anniversary of the date Investor (sic) subscribed for such Shares shall be and hereby is revised with respect to Investor's current and future subscriptions in the Fund, to provide a redemption right by Investor (sic) of all or any part of such Investor's Shares in the Fund as of the last business day of any fiscal month upon 60 calendar days' prior written notice provided, however, that redemptions of Shares that occur (i) on or before the last business day of the first six fiscal months following the effective date of the subscription for such shares shall be subject to a 3% redemption fee on the amount redeemed; (ii) after the sixth fiscal day but on or before the last business day of the ninth fiscal month following the effective date of the subscription for such shares shall be subject to a 2% redemption fee on the amount redeemed; and (iii) after the ninth fiscal month but on or before the last business day of the twelfth fiscal month following the redemption date of the subscription for such shares shall be subject to a 1% redemption fee on the amount redeemed...."*



The Side Letter goes on to state:

> "*Investor and the Fund each represent and warrant that this letter agreement has been duly authorised, executed and delivered and constitute its legal, valid and binding obligation*"

and was signed by ABL, the Appellant and Mr. Bell on behalf of the Investment Manager.

40. Mr. Tosar contends that the Side Letter varies the Subscription Documents, including the CIM and the Articles, to specifically disapply the two-year lockup to the PS-1 Shares "held by the Appellant through his Custodian", subject to certain early redemption fees to be charged on any redemptions made within one year from the subscription.

41. On the 31st October 2007 Fortis sent the Redemption Request for US$29 million and again pointed out that Fortis was executing the transaction in its capacity as Custodian for the Appellant.

42. On the 8th November 2007 the Company acknowledged the Request to redeem 5,687.8031 Shares of the Company and said it would be processed based on the NAV as of the 31st December 2007.

43. On the 6th January 2008 the Company made a redemption payment to Fortis in the sum of US$11,102,733.28. Fortis acknowledged receipt of these funds from the Company in its letter dated 3rd October 2008.

44. On the 22nd January 2008 SFS sent an email stating that the Company could not honour the redemption for class PS-1 Shares. SFS indicated that as per the

> *"Fund's Operating Memorandum, any redemptions relating to subscriptions occurring on or after February 1, 2006 (PS-1) would be subject to a two-year lockup period. Operating on a FIFO method we have accepted the full redemption value of $11,102,733.28 as at the NAV of December 31, 2007."*

The email went on to state:

> *"Unfortunately due to the lockup period, we are unable to honour the redemption of the class PS-1 remainder. We have accordingly revised your transaction acknowledgement and attached a copy for your reference."*

SFS also sent a cancellation acknowledgement dated the 22nd January 2008 to Fortis as Custodian of the Appellant.

45. On the 26th September 2008 Mr. Bell sent an email to Investors purporting to suspend subscriptions and redemptions. Mr. Bell pointed out that the offices of the Petters Group Worldwide – an affiliate of the principal borrower and corporate guarantor under a credit facility – were "raided" by US federal authorities including the FBI.

Mr. Bell went to state:

> *"Because of the uncertainty caused by this federal investigation, we have determined that it is appropriate to suspend the acceptance of new investments into the Funds, and [we] are deferring all prospective Investments that have been planned for October 1, 2008. Similarly, it is very likely that we will be unable to determine a (reliable) NAV for the Funds as of September 30, 2008 and, accordingly, may be forced to suspend any redemptions slated for that date."*

46. On the 3rd October 2008 Fortis sent a letter to the directors of the Company requesting value as at December 31, 2007 and requesting:

"*The redemption of US$29,000,000 of the Shares of Lancelot – then held by us in our capacity as Custodian.*"

Fortis stated:

"*.... payment of 5,687,8031 voting participating Shares of Lancelot at an aggregate NAV as at December 31, 2007 of US$11,102,733.28 was received. However the balance of the redemption request amounting to US$17,897,266.72 remains outstanding.*"

Fortis went on to state:

"*It has previously been intimated to the beneficial owner for whom we act as Custodian that the redemption request in respect of the balance was cancelled at the insistence of Lancelot's Investment Manager. Cancellation or withdrawal of a Redemption Request, in whole or in part, is not within the power or competency of the Investment Manager or Lancelot. As neither we, as registered holder of the shares to be redeemed, nor the beneficial owner thereof, took any action to withdraw or otherwise cancel such redemption requests prior to the redemption date, Lancelot was obliged in accordance with its Articles of Association to redeem PS-1 voting participating Shares, having an aggregated NAV as at December 31, 2007 equal to US$17,897,266.72.*"

47. On the 2nd October 2008 the directors of the Company passed a resolution to suspend further redemptions of the Company's shares.

48. On the 3rd October 2008 the directors of the Company resolved to file the US Bankruptcy Proceedings.

GRAND COURT - CAYMAN ISLANDS

49. On the 20th October 2008 the US Bankruptcy Proceedings were filed by the Company and consequently the US Trustee, an official of the US Department of Justice, appointed Mr. Ronald R. Peterson ("Mr. Peterson") as the Interim Case Trustee of the Company. On the 2nd December 2008 Mr. Peterson's appointment as Chapter 7 Trustee was made permanent.

50. On the 31st December 2008 the Company was placed into official liquidation by Order of the Grand Court of the Cayman Islands, and Mr. Geoffrey Varga ("Mr. Varga") of Kinetic Partners was appointed the Official Liquidator.

51. On or about the 30th July 2009 Fortis, as Custodian of the Appellant, filed a Proof of Claim in the US Bankruptcy Proceedings in the amount of US$17,897,266.72 as creditor.

52. On the 19th August 2009 the Chapter 7 Trustee, Mr. Peterson, and the Official Liquidator, Mr. Varga, entered into a Cross-border Insolvency Protocol Agreement regarding the Company. Clause 13(b) of the Cross-border Insolvency Protocol Agreement reads:

> *"Recognition of Other Proofs of Claim, Debt or Interest: The Trustee and the Liquidator recognise that there are both similarities and significant differences between the insolvency laws of the United States and the insolvency laws of the Cayman Islands with respect to the procedures for the filing and allowance of claims, debts and interests. Consequently, except as expressly provided herein (including paragraph 13(c) hereof), the Liquidator and, to the extent necessary, the Courts of the Cayman Islands, shall be responsible for implementing, in accordance with the laws of the Cayman Islands, the process for the filing, consideration and adjudication of claims or debts against, and equity interests in, Lancelot Offshore. [Furthermore]....the decisions of the Liquidator and/or*

the Courts of the Cayman Islands in relation to the adjudication of proofs of debt and proofs of interest shall be binding on the Trustee and in the Lancelot Offshore Chapter 7 case."

53. On the 26th January 2011 Fortis (which by this date had changed its name to ABN AMRO Fund Services (Cayman) Limited as a result of a merger between Fortis and ABN AMRO Bank NV wrote to the Appellant stating:

"We refer to the Custody Agreement dated the 26th August 2005 between the Fund and ABN AMRO Fund Services Bank (Cayman Limited) (formerly Fortis Bank (Cayman) Ltd) .... we hereby give you notice pursuant to Clause 1 that we are terminating the Custody Agreement on ninety days' notice. The Agreement will terminate ninety days from the date hereof ... which was the 26th April 2011."

The letter went on to state:

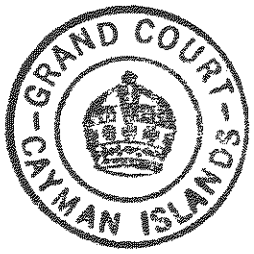
"In order to ensure a smooth transition for you, please let us know as soon as a new Custodian is appointed."

54. On the 20th September 2012 the Official Liquidator sent a Notice of Rejection of Proof of Claim to Fortis pursuant to O.16 r.6 of the ***Cayman Islands Companies Winding Up Rules***, stating that he had adjudicated upon its proof of claim and that he was rejecting its claim in full.

55. The Official Liquidator set out four grounds on which the claim by Fortis was rejected. The grounds are as follows:

Ground 1: The Redemption Request in relation to the PS-1 Shares was properly refused:

> *"It is accepted that by letter of 31st October 2007 a redemption request was submitted by Fortis Bank (Cayman) Limited ("Fortis") by which Fortis applied to redeem shares amounting in value to US$29,000,000 for a redemption date of 31st December 2007. However, as at 31st October 2007 Fortis only held shares to a value of US$11,102,733.00 of PS Participating Shares ("PS Shares"). The remainder of the shareholding held by Fortis in the Fund was in PS-1 Voting Participating Shares ("PS-1 Shares") for which it had subscribed and which had been issued to it, after the 1st February 2006. As was apparent from the Confidential Information Memorandums issued by the Company from January 2006, and from the Additional Subscription Request forms by which Fortis applied to subscribe for PS-1 Shares, shares purchased on or after 1st February 2006 i.e. PS-1 Shares, were subject to a two-year lockup and could not be redeemed prior to the two-year anniversary of the date on which the Shareholder purchased them."*



> *"It was not possible therefore for Fortis to redeem any PS-1 voting Participating Shares on the 31st December 2007 as it had not held such Shares for more than two years at that time. Accordingly, that part of Fortis' redemption request which related to the redemption of PS-1 Shares was properly rejected by the Company acting through its Administrator."*

Ground 2: Fortis' Claim is Barred under principles of acquiescence and/or estoppels and/or forbearance and/or waiver and/or affirmation:

"The rejection of that part of Fortis' redemption request was communicated to Fortis by an email from the Company's Administrator on 22nd January 2008. It followed from this that the Company would continue to treat Fortis as shareholder in respect of its PS-1 Shares and would, inter alia, take into account Fortis' remaining shareholding when conducting its affairs, including when it calculated its NAV, accepted new subscriptions, and made redemption payments to other shareholders. Despite knowing that the Company would so act, Fortis made no complaint in relation to the rejection, until it sent a letter to the Company on 3 October 2008, which was after the discovery of the fraud referred to in paragraph 7 below and shortly before the commencement of the liquidation of the Company. Further, Fortis received redemption proceeds in the sum of US$11,102,733 in relation to the redemption of its PS Shares. It did so without demurrer or protest. Accordingly Fortis is now barred under principles of acquiescence and/or estoppels and/or forbearance and/or waiver and/or affirmation from proving for its purported claim."

Ground 3: The Company is not bound by the NAV declared on the 31st December 2007 which was clearly incorrect:

Ground 3 is asserted in the alternative to grounds 1 and 2. The Official Liquidator confirms that the NAV as at 31st December 2007 was in reality zero or a little more than zero and therefore Fortis' claim is rejected on the basis that it is materially re-stated and should be valued as zero.

Ground 4: The Company is entitled to set off the claims it has against Fortis and thereby reduce Fortis' claim to zero:

Ground 4 is asserted in the alternative to Grounds 1 and 2. The Official Liquidator confirms that the NAV was overstated. Any previous redemption payments constitute mistaken payments which can be applied by way of set off against the debt claimed.

56. On the 22nd November 2012 Messrs Solomon Harris instructed by the Appellant wrote to the Official Liquidator's attorneys stating that, pursuant to the 26th April 2011 termination of the CA between the Appellant and Fortis, (by Fortis' successor in title, ABN AMRO Fund Services Bank (Cayman) Ltd., the Appellant currently holds all rights and legal title to the debt particularized in the proof.

57. In relation to Ground 1, Messrs Solomon Harris agree that the Official Liquidator is correct when he asserts that the Company acting through its Administrator rejected Fortis' request, dated the 31st October 2007, to redeem $29,000,000 worth of Participating Shares, on the basis that it included a request to redeem PS-1 Shares purchased after the 1st February 2006, which were subject to a two-year lockup period in accordance with the redemption provisions of the relevant CIM.

58. In their letter dated the 22nd November 2012, Messrs. Solomon Harris state that the Side Letter removed the two-year lockup period and confirmed that PS-1 Shares could be redeemed at the end of any fiscal month (upon sixty days' notice, rather than at the end of a fiscal quarter.)

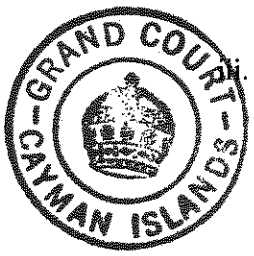
59. On the 14th December 2012 the Appellant issued its Appeal to the Grand Court seeking an Order that the rejection of the Appellant's proof of debt – by notice dated the 20th September 2012 – be set aside and further that the Appellant's claim be admitted to proof in the sum of $17,897,266.72.

APPELLANT'S POSITION

60. The Appellant makes five main submissions:

i. The Side Letter is binding on the Company and Fortis and therefore operates to vary the redemption rights which attach to the shares held by Fortis on behalf of the Appellant. In particular, the Appellant submits that the Side Letter removes the two-year lockup period in relation to the Appellant.

ii. Alternatively, if the terms of the Side Letter are not valid, the Company was obliged to process the redemption request, by the next available redemption date, namely the 30th June 2008.



iii. The Appellant submits that the Company does not have any proper defence of acquiescence and/or estoppels and/or forbearance and/or waiver and/or affirmation based on the conduct of the Appellant during the period January to October 2008.

iv. The Official Liquidator is not entitled to re-state the NAV of the Company. Further, the Official Liquidator does not have an actionable claim in mistake or any restitutionary right of recovery.

v. The Official Liquidator does not have a valid claim of set-off in the present circumstances, as against the Appellant's claim.

SIDE LETTER

61. Leading counsel on behalf of the Appellant submitted that it is common ground that if the Appellant is entitled to redeem its shares, and if the Official Liquidator is not allowed to recalculate the NAV, then the Appellant is owed the sum of US$17,897,266.72. To put it another way, if the Appellant is entitled to redeem its shares, then the Official Liquidator is not allowed to recalculate the NAV.

62. Mr. Lowe states that the basic question in this Appeal is whether the Appellant had the rights recognised by s.37 of the Companies Law to redeem shares in the way that it had occurred.

63. It is agreed between the parties that the Articles of Association, taken together with the CIMs, do sufficiently set out the redemption rights and further that the ability of the Company in the Cayman Islands to issue redeemable Shares is provided for in s.37(3) of the Companies Law, and the Company is required to record that in the Articles and constitutional documents.

64. Leading counsel reminds the court of the decision of the Privy Council in ***Culross Global SPC v. Strategic Turnaround Master Partnership Limited*** 2010 (2) CILR 364 where Lord Mance stated at paragraph 8 on page 369:

> *"It is a basic principle of company law that capital subscribed to a company may not be returned to shareholders otherwise than as prescribed by statute. Section 37(1) of the Companies Law permits the issue by a company of shares liable to be redeemed at the option of the company or shareholder and s. 37(3)(c) goes on to provide that "redemption of shares may be effected in such a manner as may be authorised by or pursuant to the company's articles of association.""*

65. The relevant Articles 6, 8, 41, 42 and 43 are set out above and the manner in which Redemptions are made is referred to in paragraph 24 paragraph 25 of the 2006 CIM which sets out the relevant provisions.

66. In particular, the Appellant relies upon the fact that both the 2003 and 2006 CIM specifically provide that:

> *"Redemptions may be permitted at such other times or with such shorter notice as the Fund, in its absolute discretion may determine."*

67. Mr. Tosar, the Managing Director of the Appellant states that the Appellant held redeemable shares of the Company through its Custodian, Fortis (which later changed its name to ABN AMRO.) It's the Appellant's position that the CA is typical of many such agreements and it confers only minimal title on Fortis and entitles the beneficiary, namely, the Appellant, to control or direct how Fortis should deal with the asset.

68. It is the Appellant's contention that since it had control of any dealings with the Shares held under the CA, it had the actual authority of Fortis to act on behalf of Fortis as the registered shareholder and the Appellant submits that Fortis acknowledges this. Accordingly, leading counsel submits that if the Company, as the third party, was aware of the Appellant's interest in the shares, or accepted the Appellant as having the authority of Fortis, there was privity of contract between Fortis and the Company when it executed the Side Letter agreement – even though it was only the Appellant that was expressly named on the shareholder's side.

69. Leading counsel on behalf of the Appellant submits that the Investment Manager, Lancelot Investment Management LLC., was authorised by the Company to invite and procure subscriptions, and therefore, the execution of side letters on behalf of the Company must have been within its authority. Accordingly, it's the Appellant's position that Mr. Bell, as Manager of the Investment Manager, was signing on behalf of the Company because he had negotiated subscriptions on behalf of the Company.

70. Furthermore, because the Appellant had signed the Side Letter, Mr. Bell, on behalf of Fortis, knew and believed that the Appellant was purporting to have the authority to enter into this Side Letter agreement. Mr. Lowe makes two points to support this submission.

a. The Side Letter expressly states on page 2:

> "*Investor and Fund each hereby represent and warrant that this Letter Agreement has been duly authorised, executed and delivered, and constitute its legal, valid and binding obligation.*"

b. In any event, it is clear from the shareholder's statements issued by the Company to Fortis, that Fortis is always described as acting as custodian on behalf of the Appellant as investor.

71. By Fortis making an early redemption request for PS-1 Shares, it must have known from the 2006 CIM that there was a two-year lockup period.

72. It is the Appellant's position that Fortis is relying on the Side Letter, and, by making the request for a redemption within the two-year lockup period, it was unequivocally an act of ratification of the Side Letter. In addition, Mr. Lowe reminds the Court that the CIMs state that redemption "*...may be permitted at such other times and with such other shorter notice as the Fund in its absolute discretion may determine.*"

73. It's the Appellant's position that the Articles are not an obstacle because one would not expect to give an agent authority to act *ultra vires*. Furthermore, Mr. Lowe submits that Article 8 and Article 41 do not prevent the Company from acting upon the Side Letter.

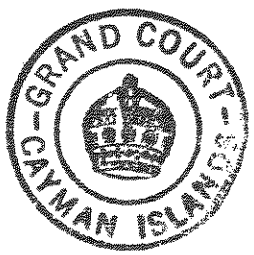
74. Accordingly, from the evidence of Mr. Tosar, the Redemption Request was made in good faith and in the belief that there was a binding and valid Side Letter between the Appellant and the Company – with the Appellant taking advantage of the directors' absolute discretion to allow Redemptions at an earlier date.

75. Mr. Lowe says that this case can be distinguished from the decision of ***Re Matador Investments Limited*** FSD 18/2012, Quin J., dated the 23rd August 2012. Mr. Lowe submits that the ***Matador*** case involved facts that are very different from the one now before the Court. He states that in ***Matador***, there was no evidence as to the agreement between the registered shareholder and the beneficial owner before the Court, for it to make any other ruling.

76. Mr. Lowe also distinguishes the case now before the Court from ***Medley Opportunity Fund Ltd. v. Fintan Master Fund Ltd. and Nautical Nominees Limited ("Medley Opportunity")***. [2012] (1) CILR 360, because in ***Medley Opportunity*** there was no evidence before the Court of the nominee relationship between the beneficial owner and the registered shareholder whereas in this case, that evidence has been put before the Court. Mr. Lowe submits that in ***Medley Opportunity***, the terms of the Side Letter were far from clear whereas in the present case the Side Letter agreement varies the Articles so as to dis-apply the two-year lockup period, subject to various additional fees. Furthermore, Mr. Lowe submits that ***Medley*** can be distinguished because, in that case, the Court was unable to consider the nature and consequences of such a legal relationship.

77. Mr. Lowe therefore states that, accordingly, as a result of the Side Letter agreement between the Company and the beneficial owner, the right to recover the debt has vested in the Appellant and therefore the Company should honour the redemption request made by the Appellant's agent, Fortis.

78. In addition, the Company knew that there were side letters executed by Mr. Bell, as principal of the Investment Manager, when he was also a director of the Company, and there is no evidence that the practice was ever countermanded. Accordingly, the Appellant's position is that the Company is estopped by the common assumption that it allowed to be made as to the Investment Manager's ability to issue such a Side Letter.



79. The Appellant maintains that Fortis was at all times in the position of a mere, bare trustee and, as such, is a passive repository of the property - required to act at the direction of the beneficiary, namely the Appellant. Once the CA was terminated then the shares in the Company passed on to the Appellant by operation of law. Accordingly, the Appellant can bring these proceedings, even though Fortis was the shareholder of record, and, therefore, an assignment of any interest is not needed because, the Appellant is the beneficial owner, and becomes the absolute owner of the relevant interest.

80. Furthermore, Mr. Lowe submits that when the Proof of Claim was rejected by the Official Liquidator, it was then that the Appellant's attorneys, Solomon Harris, wrote to the Official Liquidator explaining their interest in the redemption claim.

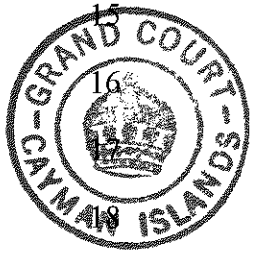
81. It is the Appellant's position that Fortis was a redemption creditor. It owned the redemption debt. However, 90 days after the determination of the CA between the Appellant and Fortis, Fortis' titles to its assets – including assets which are debts, creditors' claims – pass by operation of law or devolution to the bare beneficiary and, therefore, it is from that point on that the bare beneficiary, namely the Appellant, has legal title to the debt. Furthermore, this is reinforced by the fact that Mr. Tosar exhibits the CA and the letter from Fortis and, accordingly, the Official Liquidator is aware of the Appellant's legal title and position.

82. The Appellant is claiming the benefit of a debt.

83. The Appellant maintains that it is claiming a debt and debts are not like shares. Debts are choses in action which are not registered and choses in action are transmitted as other personal property in a different way from shares. With choses in action you do not need to execute a formal document as a transfer. Mr. Lowe submits that you can execute an assignment but you can also succeed to a chose in action by operation of law.

84. Mr. Lowe submits that the CA created a relationship between the registered shareholder, Fortis, and the Appellant was that of a bare beneficiary and bare trustee. The termination of the Custodian Agreement does not get rid of the bare trustee's legal title. Termination took place in January 2011 – long after the redemption occurred. The Company is a debtor so Fortis was no longer needed and could no longer claim to be a registered shareholder. Accordingly, the Appellant is claiming under the rights of a creditor.

85. The Appellant contends that the CA and the letter of the 26th January 2011 are sufficient writing to constitute the assignment, and the Company has sufficient notice of it, because it has the CA and it has the letter. Until notice is given, the Appellant is an equitable assignee, but, once notice is given, full title is passed on to the Appellant.



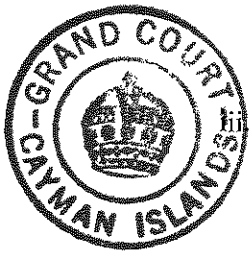
86. Accordingly, leading counsel concluded by saying that the Appellant has full title, but if the Court is not with them on the full title, they have given an assignment and all the elements of a full assignment were there. Furthermore, if the Court is not satisfied that there is an assignment, then the Appellant as bare trustee can sue under ***Roberts v. Gill & Co. and Another [2011]*** **1 A.C. 240.**

POSITION OF THE OFFICIAL LIQUIDATOR

87. Mr. McDonough, counsel on behalf of the Official Liquidator submits that:

i. A beneficial owner of shares, such as the Appellant, cannot maintain an action in the circumstances of this case.

ii. The Side Letter is ineffective and cannot vary the rights attached to the PS-1 Shares.

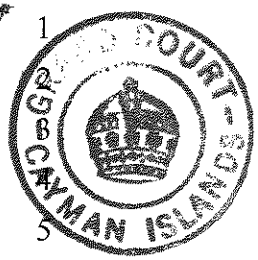


iii. Neither the Articles nor the 2006 CIM provide for unsuccessful redemptions to be rolled over.

iv. The NAVs for the Company were materially overstated for a number of years.

88. Mr. McDonough submits that the burden of proof to establish *locus standi* lies with the Appellant. Mr. McDonough states that it is remarkable that Fortis have not filed any evidence in these proceedings. There is no evidence of any assignment. Mr. McDonough submits that if Fortis had wished to assign its interest, it would have been simplest task to complete.

89. Mr. McDonough relies on the evidence of Mr. Bryan Darroch ("Mr. Darroch"), who worked for Fortis in Cayman from 2001 to 2004 and then for Fortis Prime Fund Solutions in the Isle of Man until May 2011. Mr. Darroch states in his affidavit that Fortis Bank continues to exist in a corporate sense, as do the other Fortis Prime Fund Solution companies. In his final paragraph Mr. Darroch states that he



"understands Fortis Bank is still in the process of transferring certain shares previously held by Fortis Bank, into the sole name of KBC, all other assets held by Fortis Bank, pursuant to the Custody Agreement, which were not subject to such procedural formalities – including any right to recover the amounts set out in the Proof of Debt – would have vested in KBC as of the 26th April 2011."

90. Consequently Mr. McDonough maintains that Fortis remains the shareholder and, as was held in ***Medley Opportunity***, it is the party and the only party entitled to receive the proceeds of redemption – unless and until notice of assignment is given.

91. Mr. McDonough submits that it cannot possibly be the case that the Official Liquidator is required to go through the process where it is asserted that, here is a Custodian Agreement that has been terminated, and you can take it on trust – the legal effect is to render the Appellant as the legal owner of that debt. Mr. McDonough submits that the Companies Winding Up Rules require something more if a creditor wants to assign this debt.

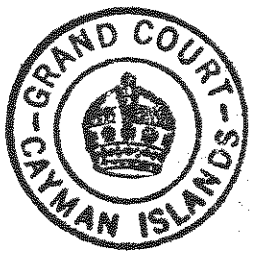
92. Mr. McDonough submits that the requirement for a legal assignment, to take effect, has not been satisfied, nor has any assignment ever been provided to the Official Liquidator for him to pay any dividend to the assignee and, accordingly, the Liquidator cannot recognise the Appellant.

93. Mr. McDonough takes issue with leading counsel for the Appellant and submits that bringing proceedings does not constitute notice in writing by the assignor. Furthermore, it is the Official Liquidator's position that Solomon Harris, who wrote to the Official Liquidator, does not act for Fortis. Fortis filed the Redemption Request and the Proof of Claim and therefore it is for Fortis to file proceedings to

challenge the rejection of the Redemption Request. The Official Liquidator submits that only the registered shareholder of the shares can maintain an action such as this, and the Appellant has no locus to stand in the shoes of Fortis, as, there is only one registered rhareholder.

94. The Official Liquidator contends that the Side Letter is of no effect and relies upon the decision of this Court in ***Medley Opportunity***. The Official Liquidator relies on the fact that the Company was not a party to the Side Letter and neither was the shareholder, Fortis.

95. The Official Liquidator maintains that neither the Articles nor the 2006 CIM provide for unsuccessful redemptions to be rolled forward in the manner suggested by the Appellant. Such redemption provisions must be codified in the Articles and there is no ability to imply any additional terms. In the circumstances the Redemption Request made by Fortis, falling within the 2-year lockup period, was simply invalid and ineffective.



ANALYSIS AND CONCLUSION

96. The Appellant's Summons dated the 14th December 2012 seeks three Orders:

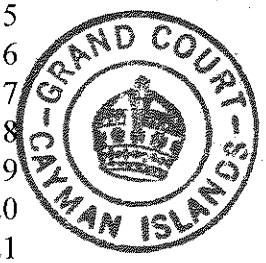
a. That the rejection of the Appellant's Proof of Debt by notice dated the 20th September 2012 be set aside.

b. That the Appellant's Claim be admitted to Proof in the sum of $17,897,266.72 and the Appellant's costs.

c. That the Appellant's costs be paid out of the assets of the Company as an expense of the liquidation.

97. The Case Memorandum prepared and filed by the Appellant's attorneys and agreed by the Official Liquidator's attorneys, has six (6) issues in dispute. The Appellant's written submissions have five which are common to the Case Memorandum and, during the hearing, this number increased to ten (10) issues in dispute.

98. The following material issues arise for this Court's determination and are referred to in the Appellant's submissions, and in the Case Memorandum.



i. Can the Appellant appeal the Liquidator's rejection of the Proof of Debt filed by the registered shareholder, Fortis?

ii. What, if any, is the effect of the Side Letter?

a) Could it reduce the redemption period to less than 2 years?

b) Was the Side Letter authorised by the Company and therefore was it binding on the Company/

iii. Can the Appellant succeed on a claim for Rolling Redemptions?

iv. Was there a binding agreement when Fortis offered Redemption and the Administrator agreed?

1. CAN THE APPELLANT APPEAL THE LIQUIDATOR'S REJECTION?

99. The Official Liquidator's position is that the beneficial owner, namely, the Appellant, in circumstances as are found in this case, cannot appeal the Liquidator's rejection of the Registered Shareholder's Proof of Debt.

100. In ***Schultz v. Reynolds and Newport Limited*** (1992-93) CILR 59, the President of the then Court of Appeal stated at line 27 on page 69:

> *"The Companies Law (Revised) recognises only members who are registered. The Appellant has not voting rights and as a beneficial owner of the shares has no rights under the Law."*

The President, Justice Zacca, went on to state at line 32:

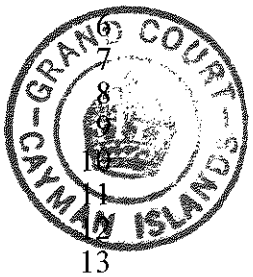
> *"In my view it is only CMS, the registered shareholder of Newport Ltd. who can institute an action against Newport Ltd."*

101. In a later Court of Appeal case, namely, ***Svanstrom and 9 Ors. v. Jonasson*** 1997 CILR 192, the Court of Appeal held that the beneficiary of a bare trustee or nominee shareholder of a fund was refused permission to bring a winding up petition as a contributory because he was not a registered shareholder.

At the third holding on page 193 of ***Svanstrom*** the Court stated:

> *"....the common law principle that a company was not obliged to recognise a trust affecting its shares was reflected in each company's articles of association, which stated that the company was not bound to recognise any record of interest but would regard a registered shareholder as being absolutely entitled."*

102. In another decision the Grand Court refused permission to a beneficiary of a bare trustee or nominee Shareholder of a Fund to bring a Winding Up Petition as a contributory because the beneficiary was not a registered shareholder. In ***Hannoun v. R Limited and Banque Syz*** [2009] CILR 124 Henderson J. stated at paragraph 8 on page 127:



> *"If the beneficiary of a bare trust whose existence and identity have not been disclosed to the corporate directors is permitted to step out of the shadows and seek the dissolution of a company in which he has an indirect interest, the law would be expanded undesirably. No case has been cited in which such a claim has been allowed to proceed and counsel said they were not aware of any. The considerations I have just mentioned are an ample justification for restricting standing to bring a winding up petition to contributories who are registered as such on the books of the company."*

103. On the 21st June 2012 in the case of ***Medley Opportunity*** the Grand Court followed this line of decisions and stated at paragraph 57 on page 381:

> *"The First Defendant is not the registered shareholder and therefore has no right of redemption or distribution or payment."*

104. Similarly, the beneficial owner, namely the Appellant, does not have locus to appeal the Liquidator's rejection of the registered shareholder's Proof of Debt.

105. The Company clearly has power to issue redeemable shares on such terms and in such manner as may be determined by the directors before the issue of shares. In this case, the PS-1 Shares in question were all issued after the 1st February 2006 and prior to the 4th May 2007. The directors had, by the time of the issue of the 2006 CIM determined the terms and manner of redemption for those shares. The 2006 CIM states:

"Commencing on the 2-year anniversary of the date a Shareholder purchased shares for shares purchased by a Shareholder on or after February 2006, such Shareholders may redeem such Shares at the Share NAV as of the last business day of a fiscal quarter upon at least 60 calendar days prior written notice to the administrator (however as discussed below, a different NAV is used for such shares redeemed on the 2-year anniversary)"

106. When Fortis submitted its subscriptions, the subscription documentation contained the following acknowledgement:

"The undersigned (Fortis) acknowledges that any additional subscriptions occurring on or after February 1 2006 will be subject to a 2-year lockup as described in the current version of the Fund's Confidential Information Memorandum [CIM] ("the Memorandum"). The undersigned also acknowledges that, with respect to any additional subscriptions made on or after February 1 2006, the terms of this additional subscription request should precede the term of any prior subscription agreement, letter agreement, Side Letter or other agreement to the extent those terms relate to the liquidity of, or rightness to redeem or withdraw, Fund Shares."

107. This Court accepts the Official Liquidator's position and agrees that it is clear from the terms of the Articles, the 2006 CIM, the aforementioned Fortis Acknowledgment, that the PS-1 Shares, which Fortis applied to redeem, were all subject to the 2-year lockup period referred to in the 2006 CIM, and therefore could not be redeemed on the 31st December 2007 as requested by the registered shareholder, Fortis.

108. It was Fortis who received the sum of US$11,102,733.28 from the Company, which represented payment of 5,687.8031 voting participating shares of the Company.

GRAND COURT - CAYMAN ISLANDS

109. The Court notes that the managing director of the Appellant, Mr. Tosar, characterizes the arrangement through the CA entered into between Fortis and the Appellant, as being one in which "*it is the Appellant who holds the Shares of the Company through its custodian, Fortis.*"

110. It was Fortis who subscribed for the Shares. It was Fortis that was registered as a Shareholder and, furthermore, it was Fortis that filed the Proof of Debt – the rejection of which is the subject of these proceedings.

111. In the case of ***Medley Opportunity*** the Second Defendant, Nautical – acting as the nominee of the First Defendant, Fintan, initially subscribed for Class A Shares in a similar set of facts to the case before this Court. In ***Medley Opportunity***, the Second Defendant, Nautical, submitted the redemption request on behalf of the First Defendant, Fintan, requesting the redemption of all the Shares. At paragraph 56 of the ***Medley Opportunity*** judgement the Court stated:

> "*.....if the first defendant chose to hold its investment through a nominee, it cannot suddenly recant from what its nominee has done in entering into the restructuring plan agreements with the plaintiff.*"

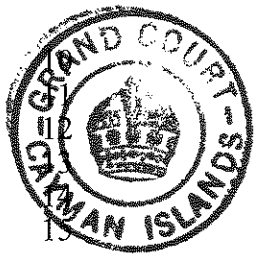
112. The nominee agreement in ***Medley Opportunity*** is similar to the CA between Fortis and the Appellant in this case, and the Court stated at paragraph 55 of ***Medley Opportunity***:

> "*If commercial business is to be conducted sensibly and with the required degree of certainty, I find that by entering into these agreements the second defendant bound the ultimate beneficiary, the first defendant, to remain in the plaintiff fund...*"

Furthermore, at paragraph 55 of ***Medley Opportunity*** the Court provided further reasons for its decision:

> *"It would cause great confusion and make no sensible commercial business sense if members such as the second defendant, (Nautical) were allowed to enter into these agreements, only the to try and redeem and enforce a redemption right by a different route."*

113. I turn now to examine the Articles of Association of the Company in this case. Article 133 of the Articles of Association of the Company reads:



> *"No person shall be recognised by the Company as holding any share upon any trust and the company shall not, unless required by law, be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable contingent or future interest in any of its shares or any other rights in respect xxx thereof, except an absolute right to the entirety thereof, and each member registered in the register of members."*

114. It is trite law but it is important to remember that s.25(3) of the ***Companies Law*** reads:

> *"When registered the said articles of association shall bind the company and members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles subject to this law and all monies payable by any member of the company, in pursuance of the conditions or regulations shall be deemed to be a debt due from such member to the company."*

115. As this Court stated on the 23rd August 2012 in ***Lansdowne Ltd. and Silex Trust Co. Ltd. v. Matador Investments Ltd. and Englefield Holdings Corp Maritime Guerrand-Hermes*** at paragraph 174 on page 54:

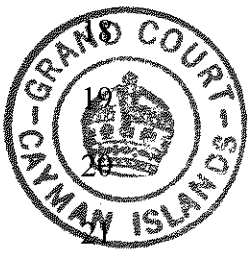
> *"As has often been cited, Articles of Association are not a simple two-party contract. They are akin to a collective agreement that creates collective rights and obligations, as between the company and all of its shareholders, and its shareholders inter se. In addition there are registered documents upon which third parties are entitled to rely when purchasing shares."*

116. Accordingly, having reviewed the Articles, the 2006 CIM and the aforesaid chronology it is clear that the only party who has the standing to appeal the rejection by the Official Liquidator is the Registered Shareholder, Fortis.

117. Finally, under this first heading, the Appellant contends that it gains title by operation of law and/or also by an assignment of title by Fortis to the Appellant.

118. The Appellant submits that it gets full legal title because of the termination of the CA or by operation of law. Either way, it is the Appellant's contention that all the assets vested in KBC – and that was the purpose of the Custody Agreement.

119. In the alternative, leading counsel submits that Fortis has assigned its interest in the Company by assignment and that the Company has notice of the assignment because it has a copy of the CA and the letter of the 26th January 2011, which constitutes an assignment. Counsel submits that, if there is any doubt about that, there is also the letter from Solomon Harris of the 22nd November 2012 and the Notice of these proceedings, all of which constitute the necessary notice that would be required to complete the assignment, and which was brought to the attention of the Company.



120. Section 5 of the ***Property (Miscellaneous Provisions) Law*** 2001 Revision sets out the requirements for a legal assignment and reads:

"*Subject to subsection (2), any absolute assignment by writing under the hand of assignor (not purporting to be by way of Charge only) of any debt or thing in action, of which express notice in writing has been given to the person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice –:*

(a) The legal right to such debt or such thing in action;

(b) All legal and other remedies for the same; and

(c) *The power to give a good discharge for the same without the concurrence of the assignor.*"

121. Furthermore, O.18 r.9 of the ***Companies Winding Up Rules 2008*** (Assignment of Right to Receive a Dividend) reads:

"9(1) *A creditor or member may assign his right to receive a dividend or instruct the official liquidator to pay his dividend to some other person.*

(2) If a creditor entitled to receive a dividend has given notice of assignment to the official liquidator, he shall pay the dividend to the assignee.

(3) If a creditor entitled to receive a dividend has given written instructions to the official liquidator that the dividend be paid to some other person, the official liquidator shall pay it in accordance with those instructions."

GRAND COURT - CAYMAN ISLANDS

122. Fortis never entered into the assignment of its right to receive a dividend to the Appellant. Furthermore, Fortis has filed no evidence in these proceedings. If Fortis wished to assign its right to receive a dividend Fortis should have executed an assignment and then given the Liquidator notice of such an assignment. There is no such assignment.

123. Fortis signed the initial Subscription Agreement. Upon signing the Subscription Agreement, Fortis provided the signatories – namely their Class A and Class B signatories. This Subscription Agreement has never been rescinded, nor have the signatories been varied or replaced. There has been no transfer of the Shares registered in Fortis' name and, furthermore, Fortis is still the registered shareholder.

124. There is no evidence from Fortis and there is no evidence whatsoever, that Fortis has assigned its interest in the Company to the Appellant.

125. Accordingly, I find that the shareholding in the Company is still legally vested in Fortis and unless and until those shares are transferred to the Appellant, the status quo remains the same. Consequently, the Appellant has no *locus standi* to appeal against the rejection by the Official Liquidator of Fortis' Proof of Debt.

2. WHAT, IF ANY IS THE EFFECT OF THE SIDE LETTER?

126. The Side Letter, dated the 6th June 2007, is signed by ABL Capital Ltd.; KBC, the Appellant; and, Lancelot Investment Management LLC (by Mr. Bell, the manager).

127. The Appellant submits that the Side Letter is also said to be "*acknowledged and agreed*" by the Company, as Mr. Bell's signature is affixed to it. Accordingly, the Appellant relies upon the Side Letter as having varied the redemptive rights attaching to the PS-1 Shares.

128. There is no evidence that Mr. Bell was a director of the Company at the time this Side Letter was executed. Furthermore, Fortis is not a party to the Side Letter.

129. I reject the Appellant's submission that because Mr. Bell solicited subscriptions for the Company, his signing of the Side Letter binds the Company. There is no evidence to support the Appellant's submission that Mr. Bell's signature as manager of the Investment Manager binds the Company in any way. There is no resolution from the directors giving Mr. Bell the power to bind the company in June 2007.

130. I reject the Appellant's submission that, somehow, Fortis ratified the Appellant's conduct. There is no evidence that Fortis ratified the Side Letter. There is no evidence that Fortis knew of the Side Letter.

131. When Fortis signed the Subscription Agreement it formally recorded the signatories upon which the Company could rely. These signatories were amended, but none of the Fortis signatories were party to the Side Letter.

132. I reject the Appellant's submission that somehow KBC is acting as agent for Fortis, and, Article 133 confirms that the Company would not recognise any such arrangement. Furthermore, I find that Article 8 does not permit the variation of rights attached to the classes of Shares, save by a resolution of the holders of those shares.

133. I accept the Official Liquidator's submission that such a provision is inconsistent with the execution of a Side Letter in favour of a single shareholder. There is no express power to enter into such an agreement and, accordingly, the directors had no such power.

134. If the Appellant wished such a power to exist, it could have, under s.33(3)(d) of the Companies Law, provided such a power in the Articles for a Side Letter governing the terms of an individual redemption.

135. As this Court stated in ***Medley Opportunity*** at paragraph 111 above:

> *"If the first defendant chose to hold its investment through a nominee, it cannot suddenly recant from what its nominee has done in entering into the restructuring plan agreements with the Plaintiff."*

136. Similarly, in ***Medley Opportunity*** and as stated in paragraphs 111 and 112 above in this case, if the Appellant chose to hold its investment through Fortis, it cannot suddenly recant from what Fortis has or has not done. Fortis did not enter into any separate agreement with the Company. Fortis did not execute any Side Letter with the Company and, accordingly, this Side Letter has no effect on the contract between the Company and the registered shareholder, Fortis. I therefore find on the balance of probability that the Side Letter does not affect Fortis' rights in any way whatsoever.

3. CAN THE APPELLANT SUCCEED ON A CLAIM FOR ROLLING REDEMPTIONS

137. The Official Liquidator appears to concede that some of the PS-1 Shares would, in theory, have passed a 2-year lock up date prior to the liquidation of the Company. Accordingly, the Appellant's leading counsel submits that the redemption request in relation to those PS-1 Shares should be treated as rolled over to the first available redemption date.

138. The Official Liquidator's Fifth Affidavit confirms that no redemption request was received for the redemption date of the 30th June 2008. The Official Liquidator, Mr. Varga, states at paragraph 4.3:

> *"Rather, it [the Appellant] appears to contend that the December redemption request (submitted on the 31st October 2007) was somehow carried over from the redemption date of the 31st December 2007 to the redemption date of the 30th June 2008."*

139. As the Official Liquidator points out, the December redemption request from Fortis requested the redemption of 29 million of both PS and PS-1 Shares on the redemption date of the 31st December 2009. The redemption request submitted by Fortis did not request the redemption of 9,977.5699 or any other number of PS-1 Shares on the 30th June 2008.

140. The Official Liquidator makes the point at paragraph 4.3(b) that the directors of the Company were:

> *"....not authorised by or pursuant to the articles to "carry over", in whole or in part, a redemption request from one redemption date to the following redemption date."*

He went on to state:

> *"Even if they had been so authorised (which is denied) there is no evidence that they were asked or purported to do so."*

141. Having reviewed the Articles of Association and the 2006 CIM, I can find no provisions for unsuccessful redemptions to be rolled forward in the matter suggested by the Appellant's counsel.

142. Lord Mance stated in ***Strategic Turnaround*** at page 381:

> *"Bearing in mind the evident importance attached in the articles, and likely to be attached by investors, to the redemption notice period and the redemption date, it would, in the board's view, require clear words before the articles could or should be read as entitling the Respondent retrospectively to reverse or alter the effect of the passing of the redemption date pursuant to a valid redemption notice. There are no clear words to that effect in the present articles, which read naturally to the opposite effect."*

143. Accordingly, the redemption request falling within the 2-year lockup period was simply invalid and ineffective. Furthermore, in light of my finding above, the Appellant had no *locus standi* to seek a redemption, rolling or otherwise, as only the registered shareholder could make such a request.

GRAND COURT - CAYMAN ISLANDS

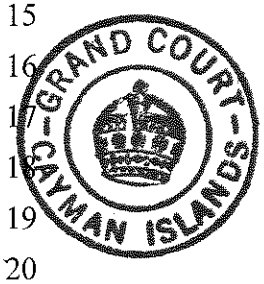
4. DID THE APPELLANT BECOME A REDEMPTION CREDITOR BECAUSE THE ADMINISTRATOR ACKNOWLEDGED AND ACCEPTED THE REDEMPTION REQUEST, OR BECAUSE IT ENTERED INTO A BINDING AGREEMENT?

144. It is common ground that Fortis' redemption request made on the 31st October 2007 was for redemption as at 31st December 2007 of shares of the total value of US$29,000,000.00.

145. On the 8th November 2007 the Administrator Swiss Financial Services (Bahamas) Ltd. accepted the December 2007 redemption request.

146. On the 22nd January 2008 the Administrator wrote to Fortis and stated:

> *"In reference to your redemption request dated the 31st October 2007 for partial redemption in the amount US$29,000,000.00, please be advised that we cannot hounour your redemption in Class PS-1. As per the Fund's Offering Memorandum, any redemptions relating to subscriptions occurring on or after February 1 2006 (PS-1) will be subject to a two-year lockup period. Operating on a First-in-First-out (FIFO) method, we have accepted the full redemption of your Class PS shares, with a full redemption value of US$11,102,733.28 as at the Net Asset Value of December 31, 2007. Unfortunately, due to the lockup period, we are unable to honour the redemption of the Class PS-1 remainder. We have accordingly revised your transaction acknowledgement and attach a copy of your reference."*



147. In addition, the Administrator produced a document entitled "Cancellation Acknowledgement" also dated the 22nd January 2008 – cancelling the portion of the December 2007 redemption request, which related to PS-1 Shares.

148. As the Official Liquidator stated, the Administrator did not provide any explanation of the entitlement to cancel, but queries the need for such an explanation because the December redemption request was invalid and the PS-1 shares were incapable of being redeemed due to the lockup period.

149. The Official Liquidator states at paragraph 21 of his Fifth Affidavit:

> *"There is no evidence that Fortis or the Appellant queried or challenged the Company's right to issue the cancellation acknowledgement until the 3rd October 2008 after the discovery and announcement of the Petters Fraud – when Fortis sent the demand letter"*

demanding payment in full of the balance of the redemption price due to only Fortis being US$17,897,266.72.

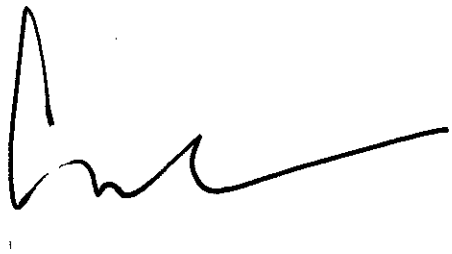
150. From the evidence before me Fortis is still the registered shareholder and Fortis has rights under the Articles of Association and the Companies Law. The Appellant has no standing and consequently, there is no binding agreement between the Appellant and the Company.

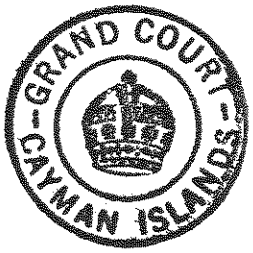
151. Accordingly, for the reasons stated above, the Court dismisses the Appellant's Summons dated the 14th December 2012 and the Appellant's claim to be admitted to proof in the US$17,897,266.72. Furthermore, the Court orders that the Official Liquidator's rejection of Fortis' proof of debt by notice dated the 20th September 2012 remains in force.

GRAND COURT - CAYMAN ISLANDS

152. As costs follow the event I order that the costs borne by Official Liquidator are to be paid by the Appellant and to be taxed on a standard basis if not agreed.

Dated this the 12th August 2012





Honourable Mr. Justice Charles Quin
Judge of the Grand Court